No. 06-278

IN THE

# Supreme Court of the United States

DEBORAH MORSE, ET AL.,

*Petitioners,*

v.

JOSEPH FREDERICK,

*Respondent.*

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

## AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENT


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## INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is a not-for-profit legal and educational organization dedicated to, *inter alia*, the defense of free speech. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici. In particular, Counsel of Record for amicus was Counsel of Record and presented oral argument for respondents (students) in *Board of Education v. Mergens*, 496 U.S. 226 (1990), and for appellees Emily Echols *et al.* (minors) in *FEC v. McConnell*, 540 U.S. 93, 231-32 (2003).

ACLJ attorneys have represented public school students facing the restriction or denial of their free speech rights. The imbalance of age and authority between student and teacher or between student and administrator make the mere assertion of free speech rights daunting for most public school children. Moreover, public schools, like colleges and universities, face a constant temptation to impose a suffocating blanket of political correctness upon the educational atmosphere. *Cf.* Br. of Amici Nat'l School Bds. Ass'n *et al.* at 3, 12, 15, 18, 21-22 (urging this Court to "cut a wider swath" (*id.* at 12) through the First Amendment to give schools the authority to decide what speech content is "offensive" or "hurtful" and to prohibit such messages). Given these circumstances, the vigorous defense of free speech rights in the public schools is a matter of considerable importance. The ACLJ therefore files this brief, not in support of Joseph Frederick's particular stunt, but rather in defense of the larger constitutional principles at stake.

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[1] The parties in this case have consented to the filing of this brief. Blanket grants of consent are on file with this Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

## SUMMARY OF ARGUMENT

This Court should dismiss the writ as improvidently granted. The factual record for both sides of the dispute suffers notable weaknesses, leaving this Court with arguments based in key respects upon surmises and inferences. Moreover, the relevance of the policies the school district invokes in defense of its censorship of a student's banner is problematic. The applicability of those policies is uncertain and is in any event ultimately a question of state law, one not yet answered by the state courts of Alaska. In short, this is a poor test case for the important constitutional questions at stake. Other, better vehicles exist, including two cases already pending on this Court's docket.

If this Court does reach the merits, it should affirm the validity of petitioner Frederick's free speech claim. (Amicus does not address the distinct question of qualified immunity.) The school district has engaged in blatant viewpoint-based censorship of student speech in a context where an otherwise identical banner from the *opposite* viewpoint (e.g., "Jesus Says 'No Drugs'") would have been permissible. A school's basic educational mission does not confer blanket authorization for viewpoint suppression of student speech.

The United States proposes a narrower exception to the First Amendment, namely, for student advocacy of *illegal* conduct. This exception, however, would be overbroad -- banning even laudable calls for civil disobedience -- and would lack the necessary connection to its purported justification, namely, student immaturity.

## ARGUMENT

### I. THIS COURT SHOULD DISMISS THE WRIT AS IMPROVIDENTLY GRANTED.

This is a poor test case for student free speech. Given the ready availability of other vehicles to address the important issues at stake, this Court should dismiss the present writ as improvidently granted.

#### A. Factual Sogginess

The case at bar is a far cry from a crisp, sharply delineated presentation of competing claims.

By his own admission, respondent Frederick's "free speech" -- the "Bong Hits 4 Jesus" banner -- was a communicatively meaningless stunt to garner publicity. Opp. at 3; JA 66-67. Petitioners portray the principal's response as an effort to enforce the school's drug policies, but it is far from obvious that these school policies even applied to Frederick's banner in the first place. (If the policies do *not* apply, the only basis the school offers in support of its restriction collapses.)

Policy 5721 clearly does *not* apply. That policy forbids the "distribution on school premises" of "published materials" that "advocate the use by minors of any illegal substance or material." Pet. App. 55a-56a. But Frederick's banner was not "distributed,"[2] the banner did not constitute "published materials,"[3] and the display was off school premises. Hence, this

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[2] "'Distribution' means circulation or dissemination of published material by means of *handing out* free copies, *selling or offering* copies *for sale and accepting donations* for copies. Further, 'distribution' includes *displaying such material in areas of the school* that are generally frequented by students." Policy 5721 (Pet. App. 55a) (emphasis added).

[3] Distribution is defined only to cover "published material." *See supra* note

(continued...)

policy was triply inapplicable.

Policy 5520 (Pet. App. 53a-54a), meanwhile, forbids any "assembly or public expression that . . . advocates the use of substances that are illegal to minors." Whether this policy applies is a closer question. Ultimately this is a matter of state law on which the state courts of Alaska have not spoken in this case. *Cf. Employment Div. v. Smith*, 485 U.S. 660 (1988) (deferring resolution of constitutional question until after state court determines legality under state law). In particular, it is uncertain if Frederick's banner "advocates" anything other than "Turn your TV cameras toward me!" *See* JA 67.

It would be regrettable if the Court were to resolve the important questions of constitutional law at issue here in the context of a jokester's prank, rather than a student's bearing of a serious message (as in *Tinker*). It would likewise be regrettable if the Court decided these important questions on a factual record based in significant respects upon inference (e.g., as to whether the school policies applied and whether respondent Frederick meant to advocate drugs at all).

**B. Alternative Vehicles**

The recurring question of what limits public schools may place on student speech is indeed worthy of this Court's attention. Dismissal of the present writ, however, would not preclude such review. Already pending on this Court's docket are two other cases on the same topic. *See Harper v. Poway Unified Sch. Dist.*, U.S. No. 06-595; *Marineau v. Guiles*, U.S. No. 06-757. Both of these other cases present students who have

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[3] (...continued)

2. The policy continues: "for purposes of this policy, 'published materials' include any written or printed cards, letters, circulars, books, pamphlets, notices, newspapers, and similar materials, in addition to materials that are distributed through the electronic media . . . ." Policy 5721(Pet. App. 55a).

serious messages to communicate -- one against homosexuality (*Harper*), and one against President Bush (*Marineau*). Moreover, the students' messages point toward opposite ends of the political spectrum. Hence, taking both of these cases together would help to wash out political considerations and focus the parties, the amici, and the Court on gleaning the proper constitutional rule for *all* student speakers, whether conservative, liberal, or neither.

Meanwhile, other restrictions on student speech, raising similar constitutional issues, arise with disturbing regularity. *See, e.g.*, "Pro-life students sue schools over censorship," WorldNetDaily (Jan. 5, 2007) available at www.worldnetdaily.com/news/article.asp?ARTICLE_ID=53643) (listing four recent incidents).

* * *

Therefore, this Court should consider dismissing the writ in this case as improvidently granted.

## II. IF THIS COURT REACHES THE MERITS, THE JUDGMENT SHOULD BE AFFIRMED.[4]

"Minors enjoy the protection of the First Amendment." *McConnell v. FEC*, 540 U.S. 93, 231 (2003) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511-13 (1969)). The proper remedy for dealing with respondent Frederick's "absurd and immature antic," *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting), would have been for school officials to advise his parents, who could have addressed the matter as they saw fit. Furthermore, schools can certainly deal with a student's defiance or insubordination wholly apart from any restriction on the content of student

[4] This brief does not address the question whether petitioner Morse should enjoy qualified immunity from damages.

messages. The school district in this case, however, chose the more drastic route of direct censorship.

Importantly, petitioners have identified no content-neutral time, place, or manner regulations that Frederick's banner violated. As far as the record reflects, students were *allowed* to display banners while watching the Olympic torch parade. The school could have limited the size of banners, restricted their placement to minimize the obstruction of the ability of others to see the parade, or perhaps even have proscribed all hand-held signs or banners. But the school did not do any of these things, and the school offers no such content-neutral defense of its action. Nor does the school proffer a *procedural* regulation, such as a requirement of prior notice to school officials of any intended display, as the basis for punishing Frederick's speech. Nor does the school even propose that Frederick violated a *topical* (but viewpoint neutral) restriction, such as one limiting students' messages on signs on the basis of germaneness to the Olympic torch parade, or barring content beyond the identification of the school or the student group (such as the school band) bearing the sign or banner. Such alternatives would have raised "no realistic possibility that official suppression of ideas is afoot." *RAV v. City of St. Paul*, 505 U.S. 377, 390 (1992).

Instead, the school has chosen to pursue *viewpoint*-based censorship as a means of achieving a *viewpoint*-based objective. *E.g.*, Pet. Br. at 16 ("policy proscribing pro-illegal drug messages"), 28 ("Messages promoting illegal substances are not to be tolerated" . . . "prohibitions on pro-drug messages"), 30 ("restrict student speech . . . viewed as promoting or advocating [drugs]"), 35 (Frederick "not at liberty to praise . . . the drug culture") 39 ("pro-marijuana banner"), 40 ("anti-drug message policy"). To all appearances, an *anti*-drug banner (e.g., "WWJD? Say No to Drugs") would have been permissible.

Hence, the petitioner school district's constitutional defense rises or falls entirely upon its ability to justify its raw viewpoint suppression.[5]

### A. Petitioners Fail to Justify Their Viewpoint Censorship.

The presumed viewpoint in question -- in favor of marijuana use -- is one the school may certainly oppose with its own message. But opposition is one thing; censorship is quite another. Here, petitioners have failed to justify the censorship of Frederick's viewpoint.

Even in a nonpublic forum, public schools must act in a reasonable and viewpoint-neutral manner when regulating student speech. *Good New Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (government's "restriction must not discriminate against speech on the basis of viewpoint"); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (government must "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").[6] In the present

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[5] That *schools* may have an obligation to convey an anti-drug message under the Safe and Drug Free Communities Act, Pet. Br. at 7, is no justification for a school forcing a *student* to convey that same message. Students are not official mouthpieces. *Accord Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality) (noting that Free Speech Clause protects private speech and that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis").

[6] The rule of *Hazelwood School District. v. Kuhlmeier*, 484 U.S. 260 (1988), regarding school curricula, obviously does not apply here. That Frederick was attending a school event when he displayed his banner no more makes that banner school-sponsored speech than does the fact that the *Tinker* students wore their armbands to class make their armbands school-

(continued...)

case, however, petitioners' own arguments convict them of viewpoint bias -- indeed, that is their sole defense.

While schools certainly have a compelling interest in forbidding illicit drug *use* among students -- and also associated sales, solicitation, and conspiracy -- this case involves (at most) sheer abstract *advocacy*. The First Amendment would be flaccid indeed if a student could not dare to voice a position contrary to that of the school. "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511.

Petitioners invoke the defense of the school's "basic educational mission," Pet. Br. at 20. While that is a worthy goal, *see Hazelwood*, 484 U.S. at 266, it is certainly not a *carte blanche* justification for viewpoint suppression. For example, while a *school-run* Bible Study would flunk review under the Establishment Clause, this does not mean that a school may ban a *student* Bible Study, even in a school-sponsored club, as "inconsistent with its basic educational mission." *See Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *see also Good News Club*, 533 U.S. at 107. And while a school may teach an exclusively pro-evolution science curriculum, this does not mean that a school could suppress the student Bible Club whenever participants question Darwinian theory or advocate a Creationist point of view. In short, mere invocation of a school's "basic educational mission" is not a constitutional trump card that justifies censoring any student speech that runs counter to the official party line (even when the party line is the right position).

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[6] (...continued)
sponsored speech.

### B. Amicus United States Also Fails to Justify the School's Viewpoint Censorship.

The United States government offers a more limited -- and, frankly, more plausible -- defense of petitioners' censorship. The government contends that the *advocacy of illegal conduct*, while protected for adults (except when there is incitement under *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam)), is unprotected for secondary school students. *See* Br. for United States at 7 ("Tinker's armband . . . did not advocate illegal conduct"), 12 ("advocating any illegal behavior . . . is antithetical to the educational mission"); *see also id.* at 16, 21 n.4. This argument has considerable force. Moreover, adoption of this relatively limited rationale would not endanger the freedom of students to utter disagreements with school policies short of advocating lawbreaking. Thus, reversal on this narrower ground would not jeopardize the rights of students challenging the politically correct viewpoint on, say, abortion or homosexuality. Nevertheless, the government's proposal ultimately cannot carry the day in this case.

To be sure, the constitutional rights of students do not always enjoy the same sweep as those of adults. School drug testing, limits on vulgar speech, and procedural due process requirements, for example, can be valid against students when they would be struck down as to adults. *See* Br. for United States at 9 n.1 (listing cases). The government, invoking this line of authority, in effect proposes that this Court adopt another constitutional exception for students, namely, by allowing the proscription of *advocacy of illegal conduct*.

This argument, while not entirely unattractive, on balance falls short. Such an exception is overbroad and bears insufficient relation to the relevant justification, namely, the immaturity of minors.

A ban on the advocacy of illegal conduct would prohibit

much laudable, even heroic, speech. In the civil rights context, there would have been no First Amendment protection for students who urged their black friends *not* to move to the back of the bus, *not* to heed race-based restroom labels, and otherwise *not* to obey racial segregation rules. In the abortion context, there would be no First Amendment protection for pro-life students who urged their classmates or others to "sit in" at abortion facilities or to refuse official directives to provide abortifacients. And on the other side of the political divide, there would likewise be no First Amendment protection for students who urge their fellows to physically restrain, as "clinic defenders," would-be participants in anti-abortion sit-ins or to fire conscientiously objecting pro-life health professionals. In the environmental context, students could not advocate civil disobedience against whale hunters (on one hand) or defiance of seemingly inane land use regulations (on the other).

Examples could be multiplied, but the point should be clear: the advocacy of illegal conduct is *not* a *malum in se*. A blanket exclusion of such advocacy from the right to free speech would be overly broad, regardless of the obnoxiousness of some particular instances of advocacy speech.

Moreover, a proscription of such advocacy would not bear the sort of relationship to *immaturity* that has warranted other constitutional exceptions for students.

The immaturity of a minor's psychosexual development certainly warrants a greater shielding of students from vulgarity, as in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).[7] The physical and emotional vulnerability of youth

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[7] Ironically, schools themselves can be the worst offenders in terms of bombarding students with vulgarity. *See, e.g., Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996).

similarly can justify more intrusive measures to detect and halt drug abuse. *See* Br. for United States at 9 n.1 (citing cases).

But no such weighty concerns warrant shielding students (or, as in this case, the general public) from a student's[8] advocacy of illegal conduct. To the contrary, students are taught -- presumably with a positive gloss -- about precisely such advocacy and even illegal conduct itself, for example when they learn of the American War of Independence, the Underground Railroad (and the abolition movement in general), the Woman's Suffrage movement, the civil rights movement, and so forth. Surely, there is no strong need to shelter youths from the concept that others may vocally and urgently call for the defiance of certain laws.

Hence, the exception the government proposes, while less restrictive of free speech than a blanket authorization of viewpoint restrictions, nevertheless cannot save the school's censorship in this case.

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[8] Of course, the school itself, as a governmental body, should not be in the business of advocating illegality.

## CONCLUSION

This Court should dismiss the writ as improvidently granted or, in the alternative, affirm the judgment below.

Respectfully submitted,

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